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No. 06-706

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In The
Supreme Court of the United States

ANTHONY ASH and JOHN HITHON,

Petitioners,

v.

TYSON FOODS, INC.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

The Brief in Opposition describes the decision of the Eleventh Circuit in terms which – if correct – would demonstrate that review by this Court is not warranted. According to respondent, the court of appeals expressly recognized that both the evidence of comparative qualifications and the "boy" remarks were indeed "probative" of discrimination. (Br. Opp. 8, 28).

This is not, however, an accurate or even plausible account of the decision below. To the contrary, the Eleventh Circuit's 2006 opinion – just like the overturned 2005 opinion – held categorically that neither the differences in qualifications nor the "boy" remarks constituted evidence of discrimination at all. The actions of the court of appeals on remand from this Court's 2006 decision do not reflect the thoughtful judicial reassessment required to comply with the mandate of this Court. Much of the language of the Eleventh Circuit's 2006 opinion was simply copied, largely verbatim, from the brief that had been filed on remand by counsel for the defendant.[1]

I. THERE IS AN IMPORTANT INTER-CIRCUIT CONFLICT REGARDING THE USE OF COMPARATIVE QUALIFICATIONS EVIDENCE TO PROVE EMPLOYMENT DISCRIMINATION

Respondent does not contend that the opinion below actually contains any language stating the comparative qualifications evidence is "probative." Rather, respondent insists that the court of appeals was tacitly applying well-established Eleventh Circuit caselaw that proof of superior qualifications *is* generally probative of discrimination, although only sufficient without more to prove discrimination if the "no reasonable person" requirement is met. Respondent, however, cannot find any Eleventh Circuit

[1] We set forth a comparison of the opinion and brief in an Appendix to this brief. The Eleventh Circuit's opinion reproduces even the typographical and grammatical errors contained in the earlier brief.

decision announcing such a two-part rule. Indeed, over the forty-one years since the enactment of Title VII, respondent is unable to identify so much as a single Eleventh Circuit decision which has ever permitted a plaintiff to rely on qualifications evidence to prove discrimination.

A. The Eleventh Circuit, Like The Fifth Circuit, Applies The "No Reasonable Person" Standard to All Attempts to Use Evidence of Comparative Qualifications

Eleventh Circuit caselaw, the Brief in Opposition asserts, carefully limits the "no reasonable person" standard to cases in which a plaintiff relies *solely* on comparative qualifications evidence. In all other cases, respondent insists, the Eleventh Circuit has a second, different, and "less demanding" standard. (Br. Opp. 25).[2] The existence of two such separate standards, the Brief in Opposition asserts, is a "critical legal distinction"; any analysis which fails to recognize that obvious distinction would be "flawed" and "confuse[d]." (Br. Opp. 14, 18, 20, 21 n.6).

But in the court of appeals respondent (correctly) insisted, to the contrary, that Eleventh Circuit caselaw recognizes only a single standard – the "no reasonable person" – applicable to all efforts to use comparative qualifications evidence. The "critical legal distinction" now trumpeted in the Brief in Opposition was never mentioned in respondent's brief on remand. Instead, respondent argued in the court of appeals that Eleventh Circuit caselaw applies the "no reasonable person" standard even to cases in which a plaintiff has also proffered other evidence of discrimination. Four earlier Eleventh Circuit cases, respondent argued, established the controlling standard.

> In these cases, comparative qualifications *and other alleged indicia of discrimination* . . . were

[2] Respondent at no point contends that the Fifth Circuit, which also utilizes the "no reasonable person" standard, limits its use in this manner.

> held insufficient on the grounds that there was no showing a reasonable person could not have decided that the qualifications of the selected person or persons warranted the decision.

(Brief on Behalf of Tyson Foods, Inc., *Ash v. Tyson Foods, Inc.*, No. 04-11695-AA (11th Cir.)).

The court of appeals accepted respondent's contention that the Eleventh Circuit's "no reasonable person" standard applies to all efforts to rely on comparative qualifications evidence. The opinion cited the same four Eleventh Circuit cases as exemplifying the "no reasonable person" standard, and explained that

> [i]n these cases, comparative qualifications *and other alleged indicia of discrimination* . . . were held insufficient for a factfinder reasonably to find that the decision was not based on the qualifications of the applicants.

(Pet. App. 7a) (emphasis added). In short, the panel made clear that the "no reasonable person" standard had been routinely and properly applied in cases where there *was* other evidence of discrimination.

Had the "no reasonable person" rule been limited by the Eleventh Circuit to cases in which a plaintiff relies *solely* on comparative qualifications evidence, that rule simply would not have been applicable to the instant case. Respondent acknowledges that the "boy" remarks were also evidence of discrimination (Br. Opp. 25-30), and the court of appeals agreed that the company's violations of its own promotion standards also constituted such evidence. (Pet. App. 14a-15a). Yet it was the "no reasonable person" standard, and only that standard, which the court of appeals applied in rejecting the comparative qualifications evidence. (Pet. App. 7a). Precisely because this case does involve such other evidence of discrimination, respondent was only able to invoke the "no reasonable person" rule in the court of appeals by insisting that the rule is *not* limited to cases in which a plaintiff relies solely on qualifications evidence.

The application of the "no reasonable person" rule to this case, despite the existence of other evidence of

discrimination, was entirely consistent with the well-established understanding of the "no reasonable person" standard in the Eleventh Circuit. The Eleventh Circuit insists, without limitation, that "[i]n the context of a promotion, '[a] plaintiff must show . . . that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff.'" *Taylor v. Roche*, 2006 WL 2613659 *1 (11th Cir. Sept. 12, 2006) (*quoting Brooks v. County Commission*, 446 F.3d 1160, 1163 (11th Cir. 2006). Both the court of appeals and district courts in the Eleventh Circuit have repeatedly applied the "no reasonable person" standard in cases in which the plaintiff had adduced other proof of discrimination.[3]

If, as respondent suggests, the Eleventh Circuit's "no reasonable person" standard were limited to cases in which a plaintiff has no other evidence, there certainly would also be in that circuit a separate line of decisions announcing and applying a distinct (presumably less demanding) standard for the common cases in which the plaintiff does have other evidence. Respondent, however, cannot identify a single appellate or district court decision in the Eleventh Circuit which has ever adopted or applied any such alternative standard for the cases in which a plaintiff does have other evidence.

B. The "No Reasonable Person" Standard In Practice Bars Use of Comparative Qualifications Evidence

Within the Eleventh Circuit, every known application of the "no reasonable person" standard has concluded that

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[3] *E.g., Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1255 n.2 (11th Cir. 2000) (evidence that the promotion standard was changed to favor the male applicant); *Gorrego v. Public Health Trust of Miami Dade County*, 293 F. Supp. 2d 1274, 1284-85 (S.D.Fla. 2003) ("anti-Hispanic slurs and derogatory remarks"); *Autry v. Nassau County School Bd.*, 2006 WL 1232812 *10 (M.D.Fla. May 8, 2006) ("blacks are lazy"); *Brown v. Marriott International, Inc.*, 2006 WL 2189695 *15 (N.D.Ga. July 31, 2006) ("deviation from the normal hiring procedure").

that standard had not been satisfied. If ever there has been a standard which, although strict in theory, is palpably fatal in practice, this is that case.

The petition reviewed all 27 appellate decisions over a six year period applying the "no reasonable person" standard – in the Eleventh and other circuits – and demonstrated that every one of those decisions, without exception, had held that the plaintiff's evidence could not meet that standard. Respondent does not dispute our characterization of these cases or contend that the petition omitted any contrary appellate decisions.

The petition also explained that the district courts in the Eleventh Circuit in every one of the 28 decisions applying the "no reasonable person" standard have held that the plaintiff's evidence was not sufficient to meet that standard.[4] Respondent asserts that "[u]ndoubtedly, there are numerous cases in which courts have found the plaintiff's qualifications evidence to be sufficient." (Br. Opp. 22 n.7). But respondent's distinguished counsel in a thoroughly researched Brief in Opposition could not find a single example of these supposed "numerous cases." Respondent objects that a district court decision finding that evidence indeed met the "no reasonable person" standard would be "a non-appealable order." (*Id.*) But Westlaw and Federal Supplement routinely publish large numbers of non-appealable orders; both have published non-appealable district court decisions from outside the Eleventh circuit which relied on the existence of comparative qualifications evidence to deny summary judgment.[5]

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[4] Petition, p. 14.

[5] Examples of such published district court decisions are set out in the Reply Brief for Petitioners, *Ash v. Tyson Foods, Inc.*, No. 05-379, pp. 2-3 n.3.

C. The Eleventh and Fifth Circuit Bar To Comparative Qualifications Evidence Conflicts With the Standard In Other Circuits

Once the actual rule in the Eleventh and Fifth Circuits is evident, the inter-circuit conflict is manifest.

In the Seventh and Sixth Circuits, unlike the Eleventh and Fifth, the "no reasonable person" rule *is* expressly limited to cases in which a plaintiff relies solely on qualifications evidence. Thus in the Seventh and Sixth Circuits, unlike the Eleventh and Fifth Circuits, there are appellate decisions which rely on qualifications evidence in sustaining discrimination claims.

In most other circuits there is (as in the Eleventh and Fifth Circuits) only a single standard applicable to all uses of qualifications evidence. Respondent does not identify any decision in the Third, Fourth, Eighth, Ninth, Tenth or District of Columbia Circuits which draws any distinction between the standard applicable in those circuits to cases in which a plaintiff does, and does not, have other evidence of discrimination. In all of these circuits – unlike the Eleventh and Fifth Circuits – there are appellate decisions upholding the plaintiff's reliance on qualifications evidence. Respondent objects that these appellate decisions were "based on the unique facts in their cases." (Br. Opp. 23). That might have been a plausible argument five years ago, before it became painfully clear that there are no facts sufficient to satisfy the Eleventh or Fifth Circuits. All appellate cases are to some degree unique, but surely appeals involving credible comparative qualifications evidence are not filed only outside the Eleventh and Fifth Circuits.

Respondent's characterization of the Ninth Circuit standard is particularly unpersuasive. Respondent asserts that "[i]n the Ninth Circuit, the 'plaintiff's qualifications [must be] *clearly superior* to the qualifications of the applicant selected.' *Odima v. West Tucson Hotel*, 53 F.3d 1484, 1492 (9th Cir. 1995)." (Br. Opp. 13) (emphasis and bracketed material in brief). The sentence from *Odima* quoted by respondent, however, is actually a description of a district court finding of fact that the qualifications of a

particular plaintiff were clearly superior. By changing the verb in this sentence from "were" to "must be," respondent improperly converts a description into a requirement. To bring this asserted clear superiority requirement into line with its description of the Eleventh Circuit standard, respondent also insists that the *Odima* "clearly superior" rule is limited to cases in which a plaintiff relies "solely on his qualifications" to prove discrimination. (Br. Opp. 14). But *Odima* (which in fact established no such requirement) clearly *did* involve other evidence which "support[ed] the district court's finding of discrimination." 53 F.3d at 1491.

D. This Case Provides An Appropriate Vehicle for Resolving This Conflict

Petitioners adduced evidence of their superior qualifications for the purpose of demonstrating that the reasons given for the disputed promotion decisions were pretextual. The employer asserted that the criterion it had used in making those promotions was a preference for supervisors with work experience outside the Gadsden plant. The central question at trial was whether that criterion had been selected in place of the company's regular promotion standards precisely because a non-Gadsden-experience criterion would disfavor the two most eligible black candidates, Ash and Hithon. Whether Hithon and Ash were indeed the best qualified candidates under Tyson's regular standards was thus important evidence in determining whether the decision to instead use the non-Gadsden-experience standard was pretextual. Evidence of comparative qualifications was utilized in a similar manner to demonstrate pretext in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).[6]

In its 2004 brief in the court of appeals, respondent insisted that this use of evidence regarding the superior

[6] See Reply Brief for Petitioners, *Ash v. Tyson Foods, Inc.*, No. 05-379, pp. 8-9.

qualifications of Ash and Hithon was a classic example of qualifications evidence, and thus was governed and barred by the "slap in the face" rule.[7] Then, in response to the 2005 certiorari petition, respondent took the opposite position, insisting that this case did not involve comparative qualifications, and that the case therefore was not an appropriate vehicle for ruling on the "slap in the face" rule.[8] On remand to the Eleventh Circuit, respondent changed position yet again, asserting in May 2006 that the instant case is indeed a comparative qualifications case, and thus is controlled by the fatal "no reasonable person" standard.[9] Having prevailed on that argument on remand, respondent now disavows it, and in this Court instead insists that this litigation does not involve comparative qualifications and that the "no reasonable person" standard for such cases was never applicable in the first place. For the reasons set forth above, the position which respondent took in the court of appeals in 2004 and again in 2006 was the correct one.

II. THE COURT OF APPEALS AGAIN DECIDED, AS IT HAD IN 2005, THAT THE PLAINTIFFS MAY NOT RELY ON EVIDENCE THAT THEY WERE REPEATEDLY ADDRESSED AS "BOY"

We explained in the petition that the court of appeals, in rejecting evidence that Ash and Hithon were repeatedly addressed as "boy," relied on a series of holdings that were inconsistent with the decisions of this Court and numerous circuits. Respondent does not assert this evidence was rejected for a different, more defensible reason. Rather, respondent contends that the Eleventh Circuit actually

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[7] Brief of Appellee Tyson Foods, Inc., *Ash v. Tyson Foods, Inc.*, No. 04-11695-AA (11th Cir.), pp. 49-50 (Sept. 15, 2004).

[8] Opposition to Petition for a Writ of Certiorari, *Ash v. Tyson Foods, Inc.*, No. 05-379, p. 16.

[9] Brief on Behalf of Tyson Foods, Inc., *Ash v. Tyson Foods, Inc.*, No. 04-11695-AA (11th Cir.), pp. 2-15 (May 4, 2006).

held the "boy" remarks were "probative" of discrimination. (Br. Opp. 28). That simply is not what occurred in the court of appeals.

Respondent asserts that the Eleventh Circuit

> acknowledged on remand that the use of the word "boy" when addressing black men "is considered to have general racial implications," [Pet. App.] at 5a.

(Br. Opp. 26). Respondent suggests that the Eleventh Circuit in 2006 concluded that the use of that word in this case indeed had such racial implications.

But the actual 2006 holding is precisely the opposite. The Eleventh Circuit in fact insisted the "boy" remarks in this case were non-racial, and declined to hold that "boy" generally has racial implications.

> The lack of modifier ["black"] in the context of the use of the word "boy" in this case was not essential to the finding that *it was not used racially*, or in such context as to evidence racial bias, in the decisions at issue, even *if* "boy" is considered to have general racial implications.

(Pet. App. 5a) (emphasis and bracketed material added). Respondent omits the first forty-five words of this sentence, including the critical term "if."

Respondent contends the Eleventh Circuit concluded that the "boy" remarks, although probative, were not strong enough to overcome Tyson's exculpatory evidence. The court of appeals is described as holding that

> [t]he District Court did not, therefore, err in concluding that the alleged remarks were "insufficient evidence of bias in the circumstances of this case to overcome the articulated reasons for Hatley's decision." [Pet. App. 5a]

(Br. Opp. 8). The actual passage in the court of appeals opinion has a very different meaning. That passage occurs in a separate paragraph, following the holding that the "boy" remarks were "not used racially." In that context the Eleventh Circuit commented:

> There was insufficient evidence of bias in the circumstances of this case to overcome the articulated reasons for Hatley's decision.

(Pet. App. 5a). The subject of this sentence is not the "boy" remarks, but the other evidence in the case. "Insufficient evidence" is a characterization of what little evidence remained in the case *after* the "boy" remarks and comparative qualification evidence were disregarded. And there is no reference to the District Court having concluded the "boy" remarks were probative but weak evidence; the District Court had in fact rejected that evidence entirely because the judge personally believed that the remarks were not made with a racial purpose. (Pet. App. 34a).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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Comparison of the Eleventh Circuit August 2, 2006, Opinion and the Defendant's May 4, 2006 Brief in the Court of Appeals[1]

Statements Regarding the "Boy" Remarks

(1) *Eleventh Circuit Opinion*:

"The usages were conversational and as found by the district court were non-racial in context." (Pet. App. 5a)

Defendant's Eleventh Circuit Brief:

"The usages were conversational and as found by the trial court were non-racial in context and 'not racial in nature.'"

(Brief on Behalf of Tyson Foods, Inc., pp. 7-8)

(2) *Eleventh Circuit Opinion*:

"But even if somehow construed as racial, we conclude that the comments were ambiguous stray remarks not uttered in the context of the decisions at issue and are not sufficient circumstantial evidence of bias to provide a reasonable basis for a finding of racial discrimination in the denial of the promotions." (Pet. App. 5a)

Defendant's Eleventh Circuit Brief:

"Even if somehow construed as racial in nature, the comments were ambiguous stray remarks not uttered in the context of the decisions at issue and are not sufficient circumstantial evidence of bias to prove pretext."

(Brief on Behalf of Tyson Foods, Inc., p. 8)

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[1] Brief on Behalf of Tyson Foods, Inc., *Ash v. Tyson Foods, Inc.*, No. 04-11695-AA (11th Cir.).

(3) *Eleventh Circuit Opinion*:

"The lack of a modifier in the context of the use of the word 'boy' in this case was not essential to the finding that it was not used racially, or in such a context as to evidence racial bias, in the decisions at issue, even if 'boy' is considered to have general racial implications." (Pet. App. 5a)

Defendant's Eleventh Circuit Brief:

"The lack of a modifier in the context of the use of the word 'boy' in this case was not essential to the finding that it was not used racially, or in such a context as to evidence racial bias, in the decisions at issue, even if 'boy' is considered to have general racial implications."

(Brief on Behalf of Tyson Foods, Inc., p. 8)

(4) *Eleventh Circuit Opinion*:

"The statements were remote in time to the employment decision, totally unrelated to the promotions at issue, and showed no indication of general racial bias in the decision making process at the plant or by Hatley." (Pet. App. 5a).

Defendant's Eleventh Circuit Brief:

"The statements were remote in time to the decision, totally unrelated to the promotions at issue and showed no indication of general racial bias in the decision-making process at the plant or by Hatley."

(Brief on Behalf of Tyson Foods, Inc., p. 12)

(5) *Eleventh Circuit Opinion*:

"The Supreme Court held that the word 'boy' used without modification was 'not always benign' and could be evidence of racially discriminatory intent." (Pet. App. 4a)

Defendant's Eleventh Circuit Brief:

"The Supreme Court held that the word 'boy' used without modification was 'not always benign' and could be racial or racially abusive."

(Brief on Behalf of Tyson Foods, Inc., p. 9)

(6) *Eleventh Circuit Opinion*:

"The Court listed five non-exclusive factors which may indicate whether the word is evidence of racial animus – 'context, inflection, tone of voice, local custom and historical usage.' *Ash*, 126 Sup. Ct. at 1197." (Pet. App. 4a-5a)

Defendant's Eleventh Circuit Brief:

"The court suggested five factors which might be considered in determining whether the speaker intended his or her use of 'boy' to be racially abusive – 'context, inflection, tone of voice, local custom and historical usage.' 126 Sup. Ct. at 1197."

(Brief on Behalf of Tyson Foods, Inc., pp. 9-10)[2]

Statements Regarding Comparative Qualifications

(7) *Eleventh Circuit Opinion*:

"The 'jump off the page test' was not essential to this court's initial conclusion that the comparative qualifications evidence did not provide sufficient evidence of pretext." (Pet. App. 6a)

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[2] Both the brief and the subsequent opinion mistakenly omit the comma that is found in this Court's opinion in *Ash* after the word "custom." See 126 Sup. Ct. at 1197.

Defendant's Eleventh Circuit Brief:

"The 'jump off the page test' was not essential to this Court's initial conclusion that the comparative qualifications evidence was insufficient to provide proof of pretext."

(Brief on Behalf of Tyson Foods, Inc., p. 14)

(8) *Eleventh Circuit Opinion*:

"Since *Ash*, we have utilized the *Cooper* standard to evaluate the level of disparity necessary to constitute proof of pretext claimed on the basis of comparative qualifications. *See, e.g., Brooks v. County Commission of Jefferson County, Al*, 446 F.3d 1160 (11th Cir., 2006); *Watkins v. City of Huntsville*, (No. 04-15607)(11th Cir. Apr. 18, 2006); *Roper v. City of Foley Police Dept.*, (No. 05-15199)(11th Cir. Apr. 18, 2006); *Price v. M & H Valve Co.*, (No. 05-15205)(11th Cir. Apr. 7, 2006)." (Pet. App. 6a-7a)

Defendant's Eleventh Circuit Brief:

"Since *Ash*, this Court has utilized the *Cooper* standard to evaluate the level of disparity necessary to be proof of pretext claimed on the basis of comparative qualifications and has not yet held pretext to be shown by such an analysis. *Brooks v. County Commission of Jefferson County, Al.*, 2006 U.S.App. LEXIS 9636; *Watkins v. City of Huntsville*, 2006 U.S.App. LEXIS 9703 (11th Cir. 2006); *Roper v. City of Foley Police Dept.*, 2006 U.S.App. LEXIS 9624 (11th Cir. 2006); *Price v. M & H Valve Co.*, 2006 U.S.App. LEXIS 8415 (11th Cir. 2006)."

(Brief on Behalf of Tyson Foods, Inc., pp. 14-15)

(9) *Eleventh Circuit Opinion*:

"In these cases, comparative qualifications and other alleged indicia of discrimination (i.e., subjective criteria used by the decision-maker, plaintiff's belief that his (or her) qualifications were superior), were held insufficient for a factfinder reasonably to find that the decision was not based on the qualifications of the applicants." (Pet. App. 7a)

Defendant's Eleventh Circuit Brief:

"In these cases, comparative qualifications and other alleged indicia of discrimination (i.e. subjective criteria used by the decision-maker, plaintiff's belief that his (or her) qualifications were superior), were held insufficient on grounds that there was no showing a reasonable person could not have decided that the qualifications of the selected person or persons warranted the decision."

(Brief on Behalf of Tyson Foods, Inc., p. 15)[3]

(10) *Eleventh Circuit Opinion*:

"In its opinion vacating our judgment, the Supreme Court instructed that the visual image of words 'jumping off the page to slap you in the face' was unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications." (Pet. App. 6a)

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[3] The brief mistakenly includes a stray comma (before the word "were") between the subject and verb in this sentence. The subsequent opinion reproduces the identical grammatical error.

Defendant's Eleventh Circuit Brief:

"The Supreme Court instructed that the 'visual image of words jumping off the page to slap you in the face' was unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications. . . ."

(Brief on Behalf of Tyson Foods, Inc., p. 14)

(11) *Eleventh Circuit Opinion*:

"The Court concluded that 'some formulation other than the test . . . articulated . . . by those words would better insure that the trial courts reach consistent results,' citing by way of contrast the articulated standard used in *Cooper v. Southern Co.*, 390 F. 3d 695, 732 (11th Cir. 2004), *cert. denied*, __ U.S. __, 126 Sup. Ct. 478 (2005), to-wit: 'disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.' *Ash*, 126 Sup. Ct. at 1197." (Pet. App. 6a)

Defendant's Eleventh Circuit Brief:

"[The Court] concluded that 'some other formulation other than the test . . . articulated . . . by those words would better ensure that the trial courts reach consistent results,' citing with approval the articulated standard used in *Cooper v. Southern Co.*, 390 f. 3d at 732, to wit: 'disparities in qualifications must be of such weight and significance that no reasonable person in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.' *Ash id.* at 1197."

(Brief on Behalf of Tyson Foods, Inc., p. 14)

General Conclusion

(12) *Eleventh Circuit Opinion*:

"There was insufficient evidence of bias in the circumstances of this case to overcome the articulated reasons for Hatley's decision, which was that the selected applicants were not associated with the prior poor performance of the plant, they had demonstrated leadership and management skills, they had superior recommendations, and they had experience in the poultry industry at more than one Tyson plant." (Pet. App. 5a-6a)

Defendant's Eleventh Circuit Brief:

"There was no other evidence of bias in the circumstances of this case so as to overcome the articulated reasons for Hatley's decision, which was that the selected applicants were not associated with the prior poor performance at the plant, they had demonstrated leadership and management skills, they had superior recommendations and they had experience in the poultry industry at more than one Tyson plant."

(Brief on Behalf of Tyson Foods, Inc., p. 12)

(13) *Eleventh Circuit Opinion*:

"The only negative – King's lack of a college degree – made him equally, but not less, qualified than the plaintiffs." (Pet. App. 6a)

Defendant's Eleventh Circuit Brief:

"The only negative – King's lack of a college degree – made him equally but not less qualified educationally than the undegreed plaintiffs."

(Brief on Behalf of Tyson Foods, Inc., p. 12)